SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1967
Nos. 1118 and 1119

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

Petitioners,

vs.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

Respondents.

REPLY TO PETITIONS FOR CERTIORARI.

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Respondents.

REPLY TO PETITIONS FOR CERTIORARI.

Respondent Savings and Loan Commissioner of the State of California (hereinafter referred to as Respondent Commissioner) offers the following considerations in response to Petitioner's Long Beach Federal Savings and Loan Association[1] and Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association[1] (No. 1118 before this Honorable Court) and N. Joseph Ross[1] (No. 1119 before this Honorable Court) Petitions for Writ of Certiorari:

[1]Parties petitioner as a group will be referred to herein as "Petitioners" and individually as Petitioner "Long Beach Federal," "Committee" and "Ross" respectively.

390 US 1011 U.S. Sup. Ct. Records, Briefs 1967, CD
Elliott v. Federal Home Loan Bank Board No. 1118*

Statement of Facts.

Respondent Commissioner adopts the Statement of Facts set forth in the Reply to Petition for Certiorari filed on behalf of Respondents Federal Home Loan Bank Board[2] and Federal Savings and Loan Insurance Corporation.[2]

It will be noted that Respondent Commissioner is a party only to two of the three cases involved in the Petitions for Certiorari here under consideration.[3]

Respondent Commissioner adds to said adopted statement the comments which follow *and* which apply specifically to allegations in Petitioners' pleadings which are of particular concern to Respondent Commissioner.

The Statement of the Case presented by Petitioner Ross states at page 8 that Respondent Commissioner moved for summary judgment in the United States District Court on the ground that the challenge to the exclusionary clauses should be rejected as a matter of law and the actions dismissed. Respondent Commissioner also relied on the ground that the United States District Court lacked jurisdiction over the person of the Commissioner and the subject matter of the action as to said Commissioner by virtue of the Eleventh Amendment, United States Constitution. (3R-1240-1262.)

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[2]Respondent Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation will be referred to individually as Respondent "Bank Board" and "Insurance Corporation" respectively.

[3]Respondent Commissioner is not a party to that case denominated in the Court of Appeals as 20378 (D.C. No. 63-1072-PH). For uniformity of record reference with other parties filing pleadings herein Respondent Commissioner will refer to the original papers in Court of Appeals Case No 20447 (D.C. No. 63-1230-PH) and Court of Appeals Case No. 20522 (D.C. No. 63-1107-PH), the two cases in which Respondent Commissioner is a party, as "2R" and "3R" respectively.

Petitioner's Long Beach Federal and Committee in their Statement commencing at page 7 of their Petition standardly make reference to Respondents Bank Board, *et al.* without differentiation between and among the various respondents. Such scattergun reference leads to glaring errors and misleading allegations in their Statement.

At page 7 these petitioners report that these respondents agreed to consent judgments for the distribution of about $7,000,000 in the form of Equitable Savings and Loan Association stock, to the savers in Long Beach Federal. The referred to distribution took place in December 1963. The Respondent Commissioner was not made a party until January 28, 1964. (3R-425a-425b.)

At page 15 these petitioners refer to the seizure of Long Beach Federal in 1960 by Respondent Bank Board, *et al.* The court may take judicial notice of the fact that Respondent Commissioner, a state officer, has no powers of seizure over federal associations, and that at the time of the seizure Long Beach Federal was a federal association.

Similarly, the report of payment of damages by respondents to Long Beach Federal, the Settlement Agreement with Long Beach Federal and the efforts to attract savings after the association was returned to private management (Petition of Long Beach Federal and Committee, pp. 16-17) relate to matters in which Respondent Commissioner was not a party.

Petitioners' Alleged Reasons for Granting the Writ.

A. Respondent Commissioner Adopts Brief of Respondent Bank Board and Insurance Corporation.

Respondent adopts as his own the Argument and Conclusion of Respondents Bank Board and Insurance Corporation set forth in the Brief in opposition to Petitions for Writs of Certiorari filed on their behalf in response to Petitioners' various petitions for certiorari.

B. Respondent Commissioner Is Not Subject to Federal Jurisdiction With Respect to His Actions in Connection With the Merger.

At the United States District Court level Respondent Commissioner moved for summary judgment on the ground, among others, that the court lacked jurisdiction over Respondent Commissioner. This issue was resolved against Respondent Commissioner at the trial court level.

At the Court of Appeals level Respondent Commissioner again urged that the United States District Court lacked jurisdiction over Respondent Commissioner because of the Eleventh Amendment to the United States Constitution and because of lack of consent by the Commissioner to suit in the federal courts. The Court of Appeals decision, rightly relying on the laches of petitioners here to dismiss their actions, had no need to reach the issue of jurisdiction.

Respondent Commissioner once more respectfully urges that he is not subject to federal jurisdiction with respect to his actions in connection with this merger.

The basic dispute in this litigation revolved around the formula for distribution of guarantee stock in Equitable Savings and Loan Association to former shareholders of Long Beach Federal. The merger agreement, to which Respondent Commissioner was not a party, contained the disputed formula. Respondent Commissioner acted pursuant to California Financial Code Sections 9203-9205 (see Appendix A) in approving the merger. Respondent Commissioner acted pursuant to California Financial Code section 6450 (see Appendix A) in issuing the stock permit. The permit set forth verbatim the formula (Paragraphs VII and VIII of the Merger Agreement) which gave rise to the dispute. The constitutionality of these state statutes has never been in issue, nor is there any question but what an adequate method of attack on an action of Respondent Commissioner is provided by California Code of Civil Procedure section 1085. (See Appendix A) implementing the authorization of judicial review provided for in California Financial Code section 5258 (see Appendix A).

Since no federal question re the statutes under which Respondent Commissioner acted ever existed in the basic lawsuits it is the position of Respondent Commissioner that the Eleventh Amendment to the United States Constitution prevents his being made a party to the action which led to the Petitions for Certiorari here under consideration.

The Eleventh Amendment of the United States Constitution reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law of equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

In *Osborn v. United States Bank,* 22 U.S. 326, 337 (1824), the court laid down the rule that a suit is not one against the state unless the state is a party to the record. This rule was repudiated by the court in *Governor of Georgia v. Madrazo,* 26 U.S. 84 (1828). It is now a well settled rule that in determining whether a suit is prosecuted against a state, the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit. *Ex parte Ayers,* 123 U.S. 443, 487 (1887), (8 Sup. Ct. 164).

The Eleventh Amendment, said the Court in *Ford Co. v. Dept. of Treasury,* 323 U.S. 459 (1945), (65 Sup. Ct. 347):

> "denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent" (p. 464).
>
> "* * * The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." (P. 467.)

The Eleventh Amendment also denies to the federal courts authority to entertain a suit against a State instituted by its own citizens (*Hans v. Louisiana,* 134 U.S. 1 [1890], [10 Sup. Ct. 504]).

The fact that the action arises under the Constitution and laws of the United States does not remove the prohibition (*Smith v. Reeves,* 178 U.S. 436, 447-448

(1900) [20 Sup. Ct. 919]). The court pointed out in *Missouri v. Fiske,* 290 U.S. 18, 26 (1933), 54 Sup. Ct. 18:

> "Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States."

The foregoing principles were recently reaffirmed in *Parden v. Terminal Railway,* 337 U.S. 184 (1964), 84A Sup. Ct. 1207, wherein the court stated:

> ". . . Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an *unconsenting State is immune from federal-court suits* brought by its own citizens as well as by citizens of another State. *Hans v. Louisiana,* 134 U.S. 1: *Duhne v. New Jersey,* 251 U.S. 311; *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 51; *Fitts v. McGhee,* 172 U.S. 516, 524. See also *Monaco v. Mississippi,* 292 U.S. 313. Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' *Hans v. Louisiana, supra,* 134 U.S., at 10; see *Duhne v. New Jersey, supra,* 251 U.S. 311; *Smith v. Reeves,* 178 U.S. 436, 447-449; *Ex parte New York,* 256 U.S. 490, 497-498. . . ." (Emphasis added.)

Ex parte Young, 209 U.S. 123 (1908), 28 Sup. Ct. 441, created an exception to the rule of state immunity from suit by permitting a suit against a state officer in his individual capacity in a federal court. The Supreme Court stated the rule in this fashion.

> "If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

Most of the cases involving the Eleventh Amendment are suits brought against state officials. Such suits "must depend upon the same principles that determine whether a particular suit is one against the United States." *Tindal v. Wesley,* 167 U.S. 204, 213 (1897), 17 Sup. Ct. 770.

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or *interfere with the public administration,*" (*Land v. Dollar,* 330 U.S. 731, 738 [1947], 67 Sup. Ct. 1009) or if the effect of the judgment would be "to restrain the government from acting or to compel it to act." *Larson v. Domestic Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949), 68 Sup. Ct. 1457.

The leading sovereign immunity case involving a federal official is the Supreme Court decision in *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949), 69 Sup. Ct. 1457. The court stated with reference to the doctrine of sovereign immunity:

> "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond

his authority and the action of the sovereign. *There is no warrant for such a contention in cases in which the decision . . . does not relate to the terms of his statutory authority.* Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams v. Nagle,* 303 U.S. 532, 542 (1938). We therefore reject the contention here. *We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign,* whether or not they are tortious under the general law, *if they would be regarded as the actions of a private principal under the normal rules of agency . . .*" (Emphasis added.)

The judgment in these cases, if as contended for by petitioner must either order Respondent Commissioner to act in a particular manner or in effect refrain from doing some act, else there is no reason for having Respondent Commissioner as a party. The decision would interfere with the public administration of a state agency, acting pursuant to state laws not here in question. It is submitted that this is a suit against a state in the federal courts within the meaning of the Eleventh Amendment to the United States Constitution, that consequently jurisdiction over Respondent Commissioner is absent, and that Respondent Commissioner should never have been retained as a party to this litigation.

Conclusion.

The petitions for writ of certiorari should be denied for the reasons set forth in the Respondents' Brief filed on behalf of the Bank Board and Insurance Corporation.

In the event that the Petition for Certiorari is granted, Respondent Commissioner should be dismissed from the action for lack of jurisdiction in the federal court system over him in this controversy.

Respectfully submitted,

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APPENDIX A.

Financial Code Sections.

§ 5258. Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2, and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. Except for review of proceedings conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, an action or proceeding for judicial review pursuant to this section must be commenced within 60 days after the issuance of such order, decision, approval, certificate, license or permit, or within 60 days after such denial, or other official act, or within 60 days after the effective date of this section whichever is the later date.

§ 6450. No association shall sell, except upon a sale for a delinquent assessment made in accordance with the provisions of this part or The General Corporation Law, or offer for sale, negotiate for the sale of, or take subscriptions for, or issue any of its stock, until the association applies for and secures from the commissioner a permit authorizing it to sell guarantee stock.

§ 9203. Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them.

§ 9204. Any domestic association may transfer its engagement funds, and property, in whole or in part, to a federal savings and loan association, or any federal savings and loan association may transfer its engagements, funds, and property, in whole or in part, to any domestic association, upon such terms as may be agreed by the affirmative vote of at least a majority of their respective directors, ratified, in the case of the contracting domestic associations by the vote or written consent of stockholders holding in the aggregate more than two-thirds of the outstanding stock and by the vote or written consent of shareholders holding in the aggregate more than two-thirds in value of the outstanding shares, and in the case of a contracting federal savings and loan association by the consent, in writing or by vote, prescribed by the laws of the United States and the regulations of the Federal Home Loan Bank Board applicable thereto.

§ 9205. Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, and with respect to any constituent domestic association he made in conformity with the provisions of law applicable to mergers, consolidations, and transfers in the case of corporations generally, and with respect to any constituent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations and transfers.

Code of Civil Procedure Section.

§ 1085. It may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board of person.